

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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OCT 20 2005

CLERK'S OFFICE
DETROIT

RICHARD A. MCBRAYER,

Petitioner,

v.

Case No. ES 04-CV-73235 DT
Hon. Lawrence P. Zatkoff

HUGH WOLFENBARGER, Warden,

Respondent.

/

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RICHARD MCBRAYER
Inmate No. 235965
Petitioner In Pro Per
Macomb Correctional Facility
34625 26 Mile Road
New Haven, MI 48048

MOTION FOR CERTIFICATE OF PROBABLE CAUSE

NOW COMES the petitioner, RICHARD A. MCBRAYER, acting In Pro Per, and pursuant to 28 USC 2253, et seq., respectfully moves this Honorable Court for Issuance of a Certificate of Probable Cause, and says as follows:

1. On August 20, 2004, petitioner filed his pro se Application for Writ of Habeas Corpus pursuant to 28 USC 2254.
2. Petitioner asserted that his application was timely filed in light of the United States Supreme Court decision in Blakely v. Washington, 542 U.S. ____; 124 S. Ct. 2531; 159 L Ed.2d 403

(2004). Petitioner further asserted that he had no available remedy to pursue in state courts because the Michigan Supreme Court refused to apply the Blakely decision to Michigan's Sentencing scheme in People v. Claypool, 470 Mich 715, 730, n 14 (2004).

3. The respondent filed a motion for summary judgment claiming that Blakely was not to be applied retroactive to cases on collateral review, and as a consequence, the application for writ of habeas corpus was time barred under the applicable statute of limitations.

4. That on information and belief (contained in the docket summary), the District Court issued an order in favor of respondent on May 5, 2005. The Court also issued a judgment on May 5, 2005, which was not entered until May 11, 2005.

5. The petitioner was not notified of the Court's order and judgment until September 30, 2005, when he received a previously requested docket summary; nor has petitioner been provided with a copy of the Court's opinion, order or judgment, even though he has asked for a copy. In fact, this motion is being prepared without benefit of the Court's opinion, order or judgment.

6. That the docket summary generated by the court clerk on September 28, 2005, (and provided to petitioner on September 28, 2004), list petitioner's address as follows: Richard A. McBrayer, Macomb Regional Facility, 34625 26 Mile Road, P.O. Box 480999, New Haven, MI 48048-0999. The docket summary address for petitioner is incorrect. The prison address does not contain a P.O. Box, nor is the zip-code 48048-0999. This error might be why petitioner never received his copy of the Court's opinion, order and judgment,

or it might not have been mailed at all.

7. That until petitioner has had the opportunity to read the Court's opinion, order and judgment, he cannot fairly nor adequately identify the issues he believes worthy of review on appeal before the Federal Court of Appeals. However, one issue is certain, petitioner has not been provided with this Court's opinion, order and judgment, which in-itself, forms the basis for relief.

8. Petitioner further believes that the question of Blakely's non-retroactivity with respect to the Fourteenth Amendment, watershed substantive right of proof beyond a reasonable doubt is debatable among reasonable jurists and should be decided independently (of itself) from the Sixth Amendment procedural right to trial by jury by the 6th Circuit Court of Appeals, or by a majority of the entire 6th Circuit Bench.

9. That petitioner reserves the right to amend this motion after he is provided with the District Court opinion, order and judgment.

WHEREFORE, petitioner requests this Court to issue a Certificate of Appealability on the issues described above and reserve decision on other appealable issues until petitioner is provided with the opinion, order and judgment and has adequate time to amend this motion and identify other issues he believes are worthy of appellate review.

Respectfully submitted,


RICHARD A. MCBRAYER
Inmate No. 235965
Macomb Correctional Facility
34625 26 Mile Road
New Haven, MI 48048
Petitioner in Pro Per

Dated: October 17, 2005.